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11.1 The Significance of Support in Cases Involving Domestic Violence

The significance of child or spousal support to an abused individual can be best understood by keeping in mind that domestic violence perpetrators use a variety of abusive tactics in order to exercise control over their intimate partners. Such tactics often include control over financial matters, such as:*

- ♦ Preventing the abused party from working or developing job skills.
- ♦ Controlling the abused party's paycheck.
- ♦ Limiting the abused party's access to money.
- ♦ Interfering with the abused party at the workplace.
- ♦ Damaging the abused party's credit rating.
- ♦ Failing to meet court-ordered support obligations.

For many abused individuals, the abuser's economic control is a key obstacle to leaving the relationship.* It is difficult to establish economic independence from an abuser, especially for individuals who have been isolated from supportive friends or relatives or prevented from acquiring work skills. It is thus critical that courts establish and facilitate enforcement of adequate spousal and child support awards to assist abused individuals in attaining economic self-sufficiency. Without such support, abused persons may be unable to provide homes for themselves or their children.

In one study, conducted in ten cities across the United States, the U.S. Department of Justice reported that 22% of homeless parents (mainly mothers) left their homes because of intimate partner violence. See Rennison and Welchans, *Intimate Partner Violence*, p 8 (Bureau of Justice Statistics Special Report, May, 2000), citing *Homes for the Homeless. Ten Cities 1997–1998: A Snapshot of Family Homelessness Across America* (Institute for Children and Poverty). As a result of this homelessness (and being physically

*See Section 1.5 on abusive tactics.

*Menard & Turetsky, *Child Support Enforcement & Domestic Violence*, 50 *Juvenile & Family Court J* 27, 30 (Spring, 1999).

*Erickson, *Child Support Manual for Attorneys & Advocates*, p 72 (Nat'l Center on Women & Family Law, Inc, 1992).

*Pearson, et al, *Child Support & Domestic Violence: The Victims Speak Out*, in *Violence Against Women* 427–429, 441, 444 (Sage Periodicals Press, April 1999).

and economically abused), abused persons may also lose custody of their children or return to their abusive partners.

Abused individuals need child and spousal support because domestic violence frequently inflicts extra financial burdens on the family. These may include:*

- ♦ Extra shelter costs.
- ♦ Broken or stolen belongings.
- ♦ Extra medical expenses.
- ♦ Counseling expenses.
- ♦ Litigation expenses.

Some commentators point out that abused individuals may be hesitant to seek the spousal or child support they need for fear that the financial benefits may not outweigh the potential risks. Such individuals may fear that paternity or child support actions have the potential to renew violence by alerting the abuser to their location, precipitating physical contact with the abuser in the courthouse, or stimulating desires for custody or parenting time that could lead to regular, dangerous contact. Aggressive child support enforcement also may pose a risk of violent retaliation by the abuser. Nonetheless, because financial independence is so important to establishing a violence-free household, it is not surprising to find research confirming that most victims of domestic violence want child support if they can obtain it safely.* Moreover, enforcement of abusers' support obligations makes sense from a policy perspective because it sends them a message that abusive tactics will not be effective to free them from their financial responsibilities.

The rest of this chapter contains information about state and federal laws that address the foregoing concerns of abused individuals in proceedings to establish and enforce support. The chapter also provides suggestions for case management practices that promote safety.

Note: A general discussion of court procedures for establishing and enforcing spousal and child support orders is beyond the scope of this benchbook. See *Michigan Family Law Benchbook*, ch 5-6 (Institute of Continuing Legal Education, 1999) for general information about these subjects. For a brief discussion of criminal sanctions for desertion and non-support, see Section 3.14(B)(4).

11.2 The Effect of Abusive Conduct on Property Division, Spousal Support, and Child Support

*See MCL 552.6(3) on the grounds for entering a divorce judgment.

Although a trial court may not consider the element of fault in its decision to enter a divorce judgment,* the Michigan Supreme Court has held that the parties' conduct is still a factor in adjudicating property questions in divorce cases. In *Sparks v Sparks*, 440 Mich 141, 157–158 (1992), the Court examined the 1971 “no-fault” amendments to the divorce act and concluded that the

Legislature’s failure to amend the property section to remove the concept of fault “evidenced an intent to retain the traditional factors when fashioning a property settlement.” The Court then listed these factors — including fault — and instructed the state’s trial courts to consider them in dividing marital property, without assigning disproportionate weight to any one factor.

This section explores how the Michigan appellate courts have applied the principles in *Sparks* to questions of property division and spousal support in divorce cases. It also addresses the question of the role of a party’s conduct in decisions regarding child support.

Note: The Friend of the Court is generally required to open a case for domestic relations matters. MCL 552.505a(1). The parties to a domestic relations matter may file a motion to opt out of having a Friend of the Court case opened. The motion must be filed with the party’s initial pleadings. See MCL 552.505a(2). However, the court must allow the parties to opt out unless the court finds that “[t]here exists in the domestic relations matter evidence of domestic violence or uneven bargaining positions and evidence that a party to the domestic relations matter has chosen not to apply for title IV-D services against the best interest of either the party or the party’s child.” MCL 552.505a(2)(d).

A. The Parties’ Conduct as a Factor in Property Division

Marital misconduct is one of several factors to consider in reaching an equitable division of marital assets upon divorce. In *Sparks v Sparks*, *supra*, 440 Mich at 157, 159–160, the Michigan Supreme Court reviewed a trial court’s property distribution made solely on the basis of one party’s extramarital sexual relationship. The Supreme Court found that the trial court had erroneously assigned disproportionate weight to this party’s conduct and remanded the case for additional findings of fact. The Supreme Court then instructed Michigan trial courts to consider the following factors whenever they are relevant to the circumstances of a particular case:

- ♦ Duration of the marriage.
- ♦ Contributions of the parties to the marital estate.
- ♦ Age of the parties.
- ♦ Health of the parties.
- ♦ Life status of the parties.
- ♦ Necessities and circumstances of the parties.
- ♦ Earning abilities of the parties.
- ♦ Past relations and conduct of the parties.
- ♦ General principles of equity.
- ♦ Any additional factors relevant to a particular case, such as the interruption of a party’s career or education.

In weighing the foregoing factors, a trial court must make specific findings regarding any that are relevant to the case. A court must not assign disproportionate weight to any one factor. 440 Mich at 158. The Supreme Court expressed the following guidelines:

“It is not desirable, or feasible, for us to establish a rigid framework for applying the relevant factors. The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations. . . . But . . . while the division need not be equal, it must be equitable. . . . Just as the final division may not be equal, the factors to be considered will not always be equal. Indeed, there will be many cases where some, or even most, of the factors will be irrelevant. But where any of the factors delineated . . . are relevant to the value of the property or to the needs of the parties, the trial court shall make specific findings of fact regarding those factors.” 440 Mich at 158–159.

In weighing a party’s conduct, the trial court’s purpose is to reach an equitable division of the marital property, not to punish the party found at fault for the breakdown of the marriage. In *McDougal v McDougal*, 451 Mich 80 (1996), the circuit court found the husband in an eight-year marriage at fault for the parties’ divorce, based on acts that included an assault on the wife. On this basis, it awarded the wife a large proportion of the marital property. The Supreme Court acknowledged that the wife was entitled to a substantial award but found the circuit court’s disproportionate award to her inequitable. It remanded the case, instructing the circuit court to consider other factors such as the duration of the marriage, both parties’ significant contributions to the marital estate, the 22-year difference in the parties’ ages, the husband’s terminal illness, the wife’s employment, and the husband’s retirement. The Supreme Court stated: “[F]ault is an element in the search for an equitable division — it is not a punitive basis for an inequitable division. We cannot agree that the element of fault in this case supports the extreme financial penalties imposed by the circuit court.” 451 Mich at 90. See also *Sands v Sands*, 442 Mich 30, 36–37 (1993), in which the Supreme Court overruled a Court of Appeals decision that would have created an automatic rule of forfeiture for cases involving concealment of assets, stating “a judge’s role is to achieve equity, not to ‘punish’ one of the parties.”

Spooner v Spooner, 175 Mich App 169 (1989), is another case illustrating how fault should be weighed in reaching a fair and equitable property settlement between the parties to a divorce. The parties to this case were divorced after the husband assaulted his wife. In granting the divorce, the trial court found that the husband was at fault for the breakdown of the marriage on the basis of the assault and other acts. The court also found that: the marriage was of short (two years) duration; the husband brought far greater assets into the marriage than the wife; and each party had the ability to earn a living. Based on these findings, the court awarded each party the assets brought into the marriage. Additionally, based on the husband’s fault, the court awarded the wife \$35,000.00 from his stock account. The Court of

Appeals upheld the trial court's property settlement. With respect to the \$35,000.00 distribution to the wife, the panel stated: "The award was based on [the husband's] fault in causing the divorce and because a legitimate inference could be made based on [the wife's] use of her money for household expenses which freed . . . [the husband] to use his own funds to strengthen those accounts." 175 Mich App at 173.

In *Welling v Welling*, 233 Mich App 708 (1999), the Court of Appeals reviewed the trial court's determination of fault in a case where a party's misconduct resulted from his use of alcohol. The party asserted that the trial court erred in considering his alcoholism when determining marital fault. The Court of Appeals disagreed, finding that the trial court correctly considered the party's *behavior* while drinking, not his status as an alcoholic. This behavior included passing out on a daily basis and verbal abuse. 233 Mich App at 710–711. The Court of Appeals further found "inapposite" the party's contention that his conduct while intoxicated was not intentional or wrongful:

"In determining 'fault' as one of the factors to be considered when fashioning property settlements, courts are to examine 'the conduct of the parties during the marriage.' [*Sparks v Sparks*, *supra*, 440 Mich at 157.] The question here is whether one of the parties to the marriage is more at fault, in the sense that one of the parties' conduct presented more of a reason for the breakdown of the marital relationship than did the conduct of the other. Clearly, defendant's conduct in this case . . . did present a greater reason for the breakdown of the relationship. This is the obvious conclusion even if we assume that the defendant's behavior was not 'intentional' or 'wrongful.' The effect of the conduct on plaintiff and the marital relationship was highly detrimental, regardless of the reasons behind it." 233 Mich App at 711–712.

In determining who is at fault for purposes of making a property division, the focus must be on the conduct of the parties leading to the separation. *Zecchin v Zecchin*, 149 Mich App 723, 728 (1986) (husband's voluntary departure from the family home at the wife's request did not justify the trial court in ascribing fault for the breakup to the wife where facts showed that marital breakdown had occurred prior to this incident).

B. The Parties' Conduct as a Factor in Awarding Spousal Support

The trial court has discretion to order spousal support to be paid "as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1). The main objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either one. *Magee v Magee*, 218 Mich App 158, 162 (1996), citing *Hanaway v Hanaway*, 208 Mich App 278, 295 (1995) and *Ianitelli v Ianitelli*, 199 Mich App 641, 642–643 (1993).

In exercising discretion to award spousal support, the court may consider a number of different factors, including a party's fault in causing the divorce. *Thames v Thames*, 191 Mich App 299, 308 (1991). In addition to fault, other factors set forth in *Thames* are:

- ♦ The past relations and conduct of the parties.
- ♦ The length of the marriage.
- ♦ The abilities of the parties to work.
- ♦ The source and amount of property awarded to the parties.
- ♦ The parties' ages.
- ♦ The abilities of the parties to pay spousal support.
- ♦ The present situation of the parties.
- ♦ The needs of the parties.
- ♦ The parties' health.
- ♦ The prior standard of living of the parties and whether either is responsible for the support of others.
- ♦ Contributions of the parties to the joint estate.
- ♦ General principles of equity.

*See *Sparks v Sparks*, 440 Mich 141 (1992), discussed above.

The Court of Appeals has weighed the foregoing factors using the same principles that apply in cases involving divisions of marital property.* In *Cloyd v Cloyd*, 165 Mich App 755 (1988), the trial court awarded the plaintiff wife custody of the parties' three children under age 18, with defendant to pay child support on a sliding scale, as well as medical expenses and insurance for the children. The court also awarded the wife the marital home and \$300.00 towards her attorney fees. The court did not, however, award spousal support to either party. In reaching its decision, the trial court found the husband more at fault than the wife for the breakdown of the parties' 19-year marriage, based in part on testimony regarding incidents of physical violence prior to the parties' separation. The trial court also found that the wife had limited prospects for future employment because she lacked education beyond high school, had not been working in the years just prior to the divorce, and suffered from a disability. On appeal, the Court of Appeals reviewed all of the trial court's findings and held that the failure to award spousal support to the wife was erroneous. The panel found that "virtually every factor weighs in plaintiff's favor." With respect to the husband's abusive behavior, the panel noted that "the past conduct of the parties factor weighs in plaintiff's favor in light of the testimony regarding defendant's violent behavior." 165 Mich App at 761.

For a Supreme Court case in which abusive conduct was a factor in the court's award of spousal support, see *Johnson v Johnson*, 346 Mich 418, 429–430 (1956) ("The plaintiff . . . was forced into court by the defendant's cruelty, and under such circumstances . . . plaintiff should not lose her marital right to support to which she would have been entitled had the marriage continued and which she was compelled to forego because of the defendant's conduct.").

C. The Parties' Conduct as a Factor in Awarding Child Support

The trial court must consider the child's needs and actual resources of each parent in determining the amount of child support. See MCL 552.519(3)(a)(vi) and *Thames v Thames*, 191 Mich App 299, 306 (1991). Trial courts must order support in an amount determined by application of the Child Support Formula developed by the state Friend of the Court Bureau under MCL 552.519(3). Orders deviating from the formula may be entered only if the court determines that application of the formula would be unjust or inappropriate. MCL 552.605(2). In making a determination to deviate from the formula, the court must set forth in writing or on the record all of the following as required by MCL 552.605(2):

- ♦ The child support amount determined by application of the Child Support Formula.
- ♦ How the child support order deviates from the formula.
- ♦ The value of property or other support awarded instead of the payment of child support, if applicable.
- ♦ The reasons why application of the Child Support Formula would be unjust or inappropriate in the case.

The court may enter a child support order agreed to by the parties that deviates from the Child Support Formula if the foregoing statutory requirements are met. MCL 552.605(3).

The Child Support Formula does not address domestic violence as a factor in determining the amount of support. Likewise, no Michigan statute or appellate case has connected domestic violence with a child's need for support as of the publication date of this benchbook. It is conceivable, however, that domestic violence could result in particular needs justifying an order for child support that deviates from the child support formula. For example, a child may need additional support to pay for medical or mental health care costs resulting from a party's violent conduct. In such cases, the child's increased needs may render application of the support formula unjust or inappropriate.

See also *Burba v Burba (After Remand)*, 461 Mich 637, 650 (2000), in which the Michigan Supreme Court held that if the Friend of the Court determines that the facts of the case render application of the Child Support Formula unjust or inappropriate, the Friend of the Court must prepare a written report including:

- ♦ The amount of support, based on actual income earned by the parties, determined by application of the Child Support Formula and all factual assumptions upon which that support amount is based.
- ♦ An alternative support recommendation and all factual assumptions upon which the alternative support recommendation is based.

- ♦ How the alternative support recommendation deviates from the Child Support Formula.
- ♦ The reasons for the alternative support recommendation.
- ♦ All evidence known to the Friend of the Court that the individual is or is not able to earn the income imputed to him or her.

The Court in *Burba* also held that as a matter of law, income disparity between the parties is *not* an appropriate reason for deviating from the Formula because income disparity is already factored into it. 461 Mich at 649.

11.3 Promoting Safe Enforcement of Support Obligations

Under MCR 3.208(B), the Friend of the Court is responsible for initiating proceedings to enforce an order or judgment for support. This section explores four things a court can do to promote safety in support proceedings where domestic violence is a factor: gather information, provide information, safeguard confidential information, and minimize contact between the parties. A general discussion of court procedures for enforcing spousal and child support orders is beyond the scope of this benchbook; however, a brief discussion of criminal sanctions for desertion and non-support appears at Section 3.14(B)(4). See *Michigan Family Law Benchbook*, ch 5-6 (Inst of Continuing Legal Ed, 1999) for general information about enforcement of child and spousal support.

A. Gathering Information

Information-gathering is key to promoting safety in the establishment and enforcement of support obligations. To respond adequately to domestic violence in support proceedings, court personnel need to know about the following:

- ♦ The nature and dynamics of domestic violence generally. A basic understanding of domestic violence enables court employees to identify it as a factor and appropriately take it into account in the cases before them. Chapter 1 contains more information about the nature and dynamics of domestic violence.
- ♦ Whether domestic violence is a factor in a particular case. The more information a court has about the presence of domestic violence in a case, the better equipped it will be to tailor its safety precautions, recommendations, orders, and enforcement measures to the needs of parties. To gather the appropriate information, employees must learn techniques to safely screen for domestic violence at all stages of a case. A discussion of case screening appears in Section 10.3 and in Lovik, *Friend of the Court Domestic Violence Resource Book* (MJI, 2001), Chapter 2.

B. Providing Information

Information is critical to abused individuals. It empowers them to escape abuse and is critical to their safety planning. Abused individuals need information about the following:

- ♦ The workings of all agencies within the support system, including those outside the court system. Accurate information about the support system is critical if individuals are to gain access to it. Knowledge about the system is particularly important in cases involving domestic violence, where an abuser may deliberately provide false information as a means of maintaining control in the relationship. Information about the system might be offered at each point where assistance is requested.
- ♦ How government support agencies will use information about domestic violence. The rules protecting confidential information (*and* the limits of these protections) should be clearly explained so that abused individuals can account for them when planning for safety.
- ♦ Each action taken in a case. If an individual knows that a court or other agency is about to take action to enforce a support obligation, the individual can take adequate safety precautions.
- ♦ Community referral resources. Because court personnel do not have the training to address all the needs of an abused individual, they need to make appropriate referrals to other community resources that can offer other types of assistance. Information about referral resources appears in Chapter 2.

C. Safeguarding Confidentiality

Because domestic violence victims sometimes go into hiding to escape their abusers, it is critical to their safety that addresses and other identifying information remain confidential. It may be necessary to remove such information from court papers that the abuser may see. Other strategies for safeguarding confidentiality are:

- ♦ Provide for privacy in interview areas so that the parties feel safe about sharing information.
- ♦ Do not bring up domestic violence issues with the alleged perpetrator present.
- ♦ Take care about discussing domestic violence issues when children, friends, or other family members are present, as the abused party may not believe they are aware of the domestic violence and/or may not want them to have specific information about it.
- ♦ Use caution before allowing a friend or family member to act as an interpreter for a person who does not speak English. The abused individual may not discuss domestic violence when these persons are present for fear that they may disclose the conversation to the abuser or for fear that the information presented may endanger the interpreter. In some cases, the interpreter might not want the violence to be disclosed, and may not accurately convey the abused individual's statements to the interviewer.*

*See Section 2.5 on cross-cultural communication.

For more discussion of the rules regarding confidential information, see Sections 10.4 and 10.5.

D. Minimizing Contact Between the Parties

Opportunities for violence arise when abusers and their intimate partners come into contact during court proceedings. To minimize contact between the parties, courts can adopt the following strategies:

*See Menard & Turetsky, *Child Support Enforcement & Domestic Violence*, 50 *Juvenile & Family Court J* 27, 33 (Spring, 1999).

*See Section 1.5 on the use of parenting time as a control tactic.

- ♦ Do not require the abused individual to come to court for proceedings unless it is absolutely necessary.*
- ♦ If both parties must come to the courthouse, provide separate waiting areas for them. Never leave the parties alone together in a waiting area.
- ♦ Meet with the parties separately to prevent coercion or intimidation of the abused individual.
- ♦ If both parties must come to the courthouse, stagger arrival and departure times. Safety concerns may require keeping the abusive party in the courthouse longer after the court proceeding has ended so that the abused individual may leave without being followed.
- ♦ Refrain from linking parenting time to support payments. In cases involving domestic violence, abusers frequently use contacts for parenting time as opportunities to harass, threaten, or assault a former partner.* Under these circumstances, a linkage between parenting time and support payments encourages the abuser's efforts to control the other parent and, in some cases, may endanger the other parent.

Because domestic violence typically involves psychological abuse as well as physical assault, opportunities for abuse arise any time the parties interact, even if the interaction does not involve physical contact. To prevent abusers from using the mail or other forms of communication to threaten or otherwise harass their victims, courts might consider the following strategies:

*Sager, *Managing Your Divorce: A Guide for Battered Women*, p 50 (Nat'l Council of Juvenile & Family Court Judges, 1998).

- ♦ If an abusive payer has income that can be withheld for support, order income withholding. Income withholding is required by federal law (see 42 USC 666(a)(1), (b)) and is the most reliable way to ensure that an abused payee receives support without being harassed or threatened by communications sent in the mail with support checks.*
- ♦ In some cases involving domestic violence, the payee may not take the initiative to enforce the support obligation of an abusive former partner. The payee in these cases may be concerned about revealing his or her whereabouts or may fear reprisal from the abusive party. It is thus important to remember that the responsibility for initiating enforcement proceedings is with the office of the Friend of the Court, not with the abused party; the payee's participation is not needed to enforce the court's order for support. See, e.g., MCR 3.208(B) and MCL 552.511(1). Communicating this fact to the abusive party may promote safety; some abusers may not engage in coercive behavior if they realize that the payee is not in a position to control efforts to enforce support obligations.

In interstate cases, the Uniform Interstate Family Support Act (“UIFSA”), MCL 552.1101 et seq., provides that a petitioner’s presence in Michigan is not required for the establishment, enforcement, or modification of a support order or for the rendering of a judgment determining parentage. MCL 552.1328(1). This statute also contains a number of evidence-gathering provisions that permit fact-finding without requiring the presence of witnesses in a Michigan court, as follows:

“(2) A verified petition, affidavit, document substantially complying with federally mandated forms, or document incorporated by reference in any of them that would not be excluded as hearsay if given in person is admissible in evidence if given under oath by a party or witness residing in another state.

“(3) A copy of a record of child support payments certified as a true copy of the original by the record’s custodian may be forwarded to a responding tribunal. The copy is evidence of the facts asserted in it and is admissible to show whether payments were made.

“(4) If furnished to the adverse party at least 10 days before trial, a copy of a bill for testing for parentage, or for the mother’s or child’s prenatal or postnatal health care, is admissible in evidence to prove the amount billed and that the amount is reasonable, necessary, and customary.

“(5) Documentary evidence transmitted from another state to this state’s tribunal by telephone, telecopier, or other means that does not provide an original writing shall not be excluded from evidence on an objection based on the means of transmission.

“(6) In a proceeding under this act, this state’s tribunal may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. This state’s tribunal shall cooperate with other states’ tribunals in designating an appropriate location for the deposition or testimony.”

MCL 552.1332 further provides that a Michigan tribunal may request a tribunal in another state to assist in obtaining discovery. Moreover, a Michigan tribunal may, upon request, compel a person under its jurisdiction to respond to a discovery order issued in another state.

11.4 Federal Information-Sharing Requirements

*42 USC
653(h)–(i).

The Federal Parent Locator Service (“FPLS”) is key to efforts to improve child support enforcement under the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”). The FPLS is operated by the federal Office of Child Support Enforcement (“OCSE”) in the U.S. Department of Health and Human Services. It includes a Federal Case Registry of Child Support Orders and a National Directory of New Hires.* 42 USC 653(a)(2)–(3) authorize the following uses for information in the FPLS:

- ♦ Establishing parentage.
- ♦ Establishing, setting the amount of, modifying, or enforcing child support obligations.
- ♦ Enforcing any federal or state law regarding the unlawful taking or restraint of a child.
- ♦ Making or enforcing a child custody or visitation determination.

In child support cases, the FPLS can be used to obtain and transmit information about the location, income, and assets or debts of persons who owe child support, are owed child support, or who have or may have parental rights regarding a child.

The National Directory of New Hires and the Federal Case Registry of Child Support Orders are linked to each other and to corresponding state databases that states must create and maintain. 42 USC 653a (State Directory of New Hires) and 42 USC 654a(e) (State Case Registry). See also MCL 400.233(h) (the Office of Child Support shall develop a statewide information system to facilitate establishment and enforcement of child support obligations). State case registries must include a single automated case registry of all IV-D cases and all child support orders (whether IV-D or not) established or modified in the state after October 1, 1998. 42 USC 654a(e). In 2003, Michigan implemented the state databases required under the federal statutes.

42 USC 654a(e) provides that the State Case Registry must include the following information:

“(1) Contents. The automated system required by this section shall include a registry (which shall be known as the ‘State case registry’) that contains records with respect to--

“(A) each case in which services are being provided by the State agency under the State plan approved under this part [42 USC 651 et seq.]; and

“(B) each support order established or modified in the State on or after October 1, 1998.

“(2) Linking of local registries. The State case registry may be established by linking local case registries of support orders through an automated information network, subject to this section.

“(3) Use of standardized data elements. Such records shall use standardized data elements for both parents (such as names, social security numbers and other uniform identification numbers, dates of birth, and case identification numbers), and contain such other information (such as on case status) as the Secretary may require.

“(4) Payment records. Each case record in the State case registry with respect to which services are being provided under the State plan approved under this part [42 USC 651 et seq.]; and with respect to which a support order has been established shall include a record of--

“(A) the amount of monthly (or other periodic) support owed under the order, and other amounts (including arrearages, interest or late payment penalties, and fees) due or overdue under the order;

“(B) any amount described in subparagraph (A) that has been collected;

“(C) the distribution of such collected amounts;

“(D) the birth date and, beginning not later than October 1, 1999, the social security number, of any child for whom the order requires the provision of support; and

“(E) the amount of any lien imposed with respect to the order pursuant to section 466(a)(4) [42 USC 666(a)(4)].

“(5) Updating and monitoring. The State agency operating the automated system required by this section shall promptly establish and update, maintain, and regularly monitor, case records in the State case registry with respect to which services are being provided under the State plan approved under this part [42 USC 651 et seq.], on the basis of--

“(A) information on administrative actions and administrative and judicial proceedings and orders relating to paternity and support;

“(B) information obtained from comparison with Federal, State, or local sources of information;

“(C) information on support collections and distributions; and

“(D) any other relevant information.”

*Note that “authorized persons” are defined differently for purposes of cases involving parental kidnapping or access to children. See 42 USC 663(d)(2) and Section 12.11.

States must periodically forward the foregoing data to the Federal Case Registry within the Federal Parent Locator Service. 42 USC 654a(f)(1). Information in the FPLS is accessible to “authorized persons.” For child support purposes, “authorized persons” are listed in 42 USC 653(c) as follows:*

“(1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amount owed as child and spousal support (including, when authorized under the State plan, any official of a political subdivision);

“(2) the court which has authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for the support and maintenance of a child, or any agent of such court;

“(3) the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving [public assistance]) without regard to the existence of a court order against a noncustodial parent who has a duty to support and maintain any such child; and

“(4) a State agency that is administering a program operated under a State plan.”

Although the data-collection and information-sharing requirements under PRWORA facilitate enforcement of child support and custody orders, they pose a potential danger to abused individuals who are in hiding from a domestic violence perpetrator. To address this concern, the Act contains a number of provisions that prevent domestic violence perpetrators from using the state and federal databases to locate victims in hiding. (These security provisions also apply when information is sought in parental kidnapping or custody enforcement cases. 42 USC 663(c).)

42 USC 654(26) prohibits the state from disclosing information to potentially dangerous individuals as follows:

“A state plan for child and spousal support must --

...

“(26) have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including --

...

“(B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party

against whom a protective order with respect to the former party or the child has been entered;

“(C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child.”

Additionally, 42 USC 653(b)(2) prohibits the OCSE from disclosing FPLS information to any person “if the State has notified the Secretary [of Health and Human Services] that the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the custodial parent or the child of such parent.” Under 42 USC 654(26)(D), the state child support agency is required to send such a notice to the Secretary if:

- ♦ A protective order with respect to the parent or child has been entered;
and
- ♦ The state has reason to believe that the release of the information may result in physical or emotional harm to the party or the child. 42 USC 654(26)(B)–(C).

After receiving this notice (also referred to as a “Family Violence Indicator”) from the state child support agency, the OCSE will not disclose FPLS data when requested by an “authorized person.” Instead, the FPLS will notify the “authorized person” that: 1) the state has given notice of reasonable evidence of domestic violence or child abuse; and 2) information can only be disclosed to a court or an agent of a court with authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for child support. 42 USC 653(b)(2), (c). The “authorized person” can then petition a court with proper jurisdiction to order a one-time override of the family violence indicator.

If a case is “flagged” with a Family Violence Indicator, 42 USC 653(b)(2)(A)–(B) requires judicial review of requests for disclosure. If the court determines that disclosure could be harmful, it may not disclose the information to anyone. If the court decides that the FPLS information would not cause the parent or child harm, the information may be released. See also 42 USC 654(26)(E), which provides:

“A State plan for child and spousal support must --

. . .

“(26) have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including --

. . .

“(E) procedures providing that when the Secretary [of Health and Human Services] discloses information about a parent or child to a State court or an agent of a State court . . . and advises that court or agent that the Secretary has been notified that there is reasonable evidence of domestic violence or child abuse pursuant to section 653(b)(2) of this title, the court shall determine whether disclosure to any other person of information received from the Secretary could be harmful to the parent or child and, if the court determines that disclosure to any other person could be harmful, the court and its agents shall not make any such disclosure.”

Additional information about the circumstances of a case in which a Family Violence Indicator is present may be available, but only through the state IV-D agency, the court that imposed the Indicator, or through the individuals involved.

Effective September 1, 2002,* the Michigan Supreme Court adopted Administrative Order 2002-03 to implement the provisions of 42 USC 654(26). Administrative Order 2002-03 provides:

“The friends of the court shall adhere to the following rules in managing their files and records:

“(1) When the Family Violence Indicator is set in the statewide automated child support enforcement system for an individual in an action, that individual’s address shall be considered confidential under MCR 3.218(A)(3)(f).

“(2) Friend of the court offices shall cause a Family Violence Indicator to be set in the statewide automated child support enforcement system on all the files and records in an action involving an individual when:

(a) a personal protection order has been entered protecting that individual,

(b) the friend of the court becomes aware of an order of any Michigan court that provides for confidentiality of the individual’s address, or denies access to the individual’s address,

(c) an individual files a sworn statement with the office setting forth specific incidents or threats of domestic violence or child abuse, or

(d) the friend of the court becomes aware that a determination has been made in another state that a

*AO 2002-3 was adopted on an interim basis in May 2002. The order was later adopted permanently. See AO 2002-7.

disclosure risk comparable to any of the above risk indicators exists for the individual.

“(3) When the Family Violence Indicator has been set for an individual in any action, the Family Violence Indicator shall be set in all other actions within the statewide automated child support enforcement system concerning that same individual.

“(4) When the Family Violence Indicator has been set for a custodial parent in any action, the Family Violence Indicator shall also be set for all minors for which the individual is a custodial parent. When the Family Violence Indicator has been set for any minor in an action, the Family Violence Indicator shall also be set for the minor’s custodian.

“(5) The friend of the court office shall cause the Family Violence Indicator to be removed:

(a) by order of the circuit court,

(b) at the request of the protected party, when the protected party files a sworn statement with the office that the threats of violence or child abuse no longer exist, unless a protective order or other order of any Michigan court is in effect providing for confidentiality of an individual’s address, or

(c) at the request of a state that had previously determined that a disclosure risk comparable to the risks in paragraph two existed for the individual.

“(6) When the Family Violence Indicator has been removed for an individual in any action, the Family Violence Indicator that was set automatically for other persons and cases associated with that individual shall also be removed.”

11.5 Public Assistance and Domestic Violence

Studies show that a significant percentage of welfare recipients are victims of domestic violence. See Raphael and Haennicke, *Keeping Battered Women Safe Through the Welfare-to-Work Journey: How Are We Doing?* p 4 (Taylor Institute, 1999) (estimating 20%–30%) and Pearson, et al, *Child Support and Domestic Violence: The Victims Speak Out*, p 443, in *Violence Against Women* (Sage Periodicals Press, April 1999) (disclosure of current or past abuse by public assistance applicants ranged from 28% to 49% at four office sites surveyed). These results are not surprising in light of the fact that domestic violence perpetrators often use economic means to exercise control — they often limit their partners’ access to money or prevent their partners from working or developing job skills. An individual so deprived of economic

independence may find it extremely difficult to return to the work force after leaving an abuser, either because of the inability to develop a work history or skills during the relationship, or because the abuser has thwarted efforts to get or keep a job the relationship has ended.

The 1996 federal Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) replaced the Aid to Families with Dependent Children (“AFDC”) program with a Temporary Assistance to Needy Families (“TANF”) program. This section explores two features of the TANF program that are of particular concern to individuals who have been subjected to domestic violence.

A. Eligibility Limits

*Pearson, et al,
supra, p 439.

The 1996 federal legislation imposed a lifetime eligibility limit of 60 months on families receiving TANF assistance. 42 USC 608(a)(7). Many commentators have expressed concerns that the federal 60-month limitation is not reasonable for abused individuals, who may take longer to develop full economic independence due to interference from their abusers. For example, in one study of public assistance applicants at four sites, 44% of applicants disclosing domestic violence reported that their abusive former partners had prevented them from working. Fifty-eight percent reported that they or their children were isolated.* To address these concerns, the federal legislation provides a “Family Violence Option,” which exempts TANF recipients from the 60-month limitation. At its discretion, a state may elect to adopt the Family Violence Option, which applies “by reason of hardship or if the family includes an individual who has been battered or subjected to extreme cruelty.” 42 USC 608(a)(7)(C)(i).

“Battered or subject to extreme cruelty” is defined in 42 USC 608(a)(7)(C)(iii) as follows:

“[A]n individual has been battered or subjected to extreme cruelty if the individual has been subjected to --

“(I) physical acts that resulted in, or threatened to result in, physical injury to the individual;

“(II) sexual abuse;

“(III) sexual activity involving a dependent child;

“(IV) being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities;

“(V) threats of, or attempts at, physical or sexual abuse;

“(VI) mental abuse; or

“(VII) neglect or deprivation or medical care.”

Regulations promulgated by the Office of Family Assistance further provide that exemptions under the Family Violence Option are granted in cases “where compliance would make it more difficult for . . . individuals to escape domestic violence or unfairly penalize those who are or have been victimized by such violence or who are at risk of further domestic violence.” 45 CFR 260.52(c).

Michigan has not adopted the federal Family Violence Option. The state has no time limit on its Family Independence Program; it does not seek federal financial participation if the family includes an adult who has received assistance payments for more than 60 months. Families in need of assistance beyond the 60-month limit are state-funded as long as they continue to meet program requirements.*

Michigan residents receiving TANF assistance must participate in the state’s “Work First” employment and training program, unless they receive a deferral from participation. Domestic violence victims may obtain a three-month exemption from work activities, which is renewable indefinitely with the approval of the Family Independence Manager. FIA workers use clients’ statements as documentation of domestic violence unless they have sufficient reason to question the statements. If they question their clients’ statements, they may request further documentation, which may include court records (among other types of records).* Once a client is deferred, the caseworker assists the client to develop a plan intended to resolve domestic violence as a barrier to self-sufficiency.

Courts can be helpful to individuals who seek a waiver from the TANF time limitations by documenting domestic violence in court orders and other written court papers.

B. Cooperation with State Child Support Agency in Locating Non-Custodial Parents

Under the TANF program, states use child support payments collected on behalf of those receiving assistance to reimburse the state for the assistance payments. Thus, TANF recipients must assign their support rights to the state as a condition of assistance and must cooperate with the state child support agency in locating non-custodial parents who owe support. 42 USC 608(a)(2)–(3) allows reduction or elimination of public assistance for noncooperation in establishing paternity or obtaining child support. However, states may adopt a “good cause” exception to the federal cooperation requirement. 42 USC 654(29).

In Michigan, failure to cooperate results in disqualification from the program for a minimum of one month; if an individual remains disqualified for four consecutive months for failure to cooperate in obtaining support, the entire case is closed. It must remain closed for a minimum of one month and cannot be reopened until the noncooperative person cooperates with the action to establish paternity or obtain support. 1997 MR 8, R 400.3125.

*TANF State Plan, p 2, (Family Independence Agency, Oct 1, 2000-Sept 30, 2002).

*Family Independence Agency, *Program Eligibility Manual 230A*, p 13–14 (Aug 1, 2001).

In situations involving domestic violence, a TANF recipient may be placed in danger by divulging the required information. Thus, a “good cause” exception exists in Michigan for appropriate cases. 1997 MR 8, R 400.3124 provides:

“(1) A client shall take all action required by [MCL 400.1 et seq] to establish paternity and obtain support.

“(2) A client may claim good cause for not taking the action specified in subrule (1) of this rule. Good cause includes any of the following reasons:

(a) The child entitled to support was conceived due to incest or forcible rape.

(b) Legal proceedings for the adoption of the child entitled to support are pending before a court.

(c) A client is currently receiving counseling from a public or licensed private social agency to decide if the child should be released for adoption and the counseling has not continued for more than 3 months.

(d) Serious physical harm to the child entitled to support.

(e) Serious physical harm to the client.

(f) Serious emotional harm to the child entitled to support that actually harms the child’s ability to function in everyday life.

(g) Serious emotional harm to the client that actually harms the client’s capacity to adequately care for the child entitled to support.

“(3) A client’s cooperation in establishing paternity and obtaining support is not required if good cause exists, but a support action may proceed if the FIA determines that the action would not endanger the child or client.

“(4) Once a client is informed of the right to claim good cause and decides to make the claim, the client shall do all of the following:

(a) Specify the type of good cause.

(b) Specify the persons covered by the claim of good cause.

(c) Provide written evidence to support the claim within 20 calendar days of filing the claim.

“(5) A good cause determination shall be made within 45 calendar days of the client’s written claim, unless the client was granted an additional 25-calendar-day extension to the original 20-calendar-

day limit and more information is needed that cannot be obtained within the 45-calendar-day limit.

“(6) A good cause determination shall make 1 of the following findings:

- (a) Good cause does not exist and the client must cooperate.
- (b) Good cause does exist and the client’s cooperation in obtaining support is not required.
- (c) Good cause does exist, but a support action can proceed without the client and without endangering the client or child.”

See also 1997 MR 8, R 400.3126–400.3128, which contain a similar cooperation requirement and good cause exception regarding identification of third-party resources (defined in 1997 MR 8, R 400.3101(1)(ii) as persons, entities, or programs that are, or might be, liable to pay all or part of a recipient’s medical expenses).

Lack of proper documentation is a key obstacle to individuals seeking to establish a “good cause” exception to the TANF cooperation requirements. One study of four social service sites in Colorado found that 59% of the “good cause” applications denied either lacked documentary evidence or lacked sufficient evidence. Successful applicants provided an average of two types of documents. A significant percentage (32%) of persons polled in this study stated that they were not interested in applying for a “good cause” exception because they lacked documents to prove harm. Pearson, et al, *supra*, p 441–443. In Michigan, 1997 MR 8, R 400.3124(4)(c) requires “written evidence” supporting a “good cause” claim to be submitted within 20 calendar days of filing the claim. Courts can be helpful to individuals who seek a “good cause” exception by documenting domestic violence in court orders and other written court papers.

11.6 Recovery of Litigation Expenses

Domestic violence victims are sometimes at an economic disadvantage as compared to their partners, especially where the abuser exercised financial control over the household or prevented the victim from earning income from work outside the home. This economic disparity may put them at a disadvantage in court proceedings by impeding their access to legal assistance. MCL 552.13(1) ameliorates this circumstance in the context of an action for divorce or separation:

“In every action brought, either for a divorce or for a separation, the court may require either party to . . . pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency.”

A request for legal fees may be made at any time during the pendency of the action under MCR 3.206(C):

“(1) A party may, *at any time*, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

“(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

“(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

“(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.” [Emphasis added.]

Reasonable legal fees in a divorce action are not recoverable as of right, but are awarded in the trial court’s discretion as necessary to enable a party to carry on or defend a suit. In awarding such fees, the trial court should make specific findings regarding the necessity of the award. Counsel who petition for fees should prepare proposed findings and call to the trial court’s attention the need for such findings. *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446 (1992); *Spooner v Spooner*, 175 Mich App 169, 174 (1989).

Guidance for exercising discretion under MCL 552.13(1) is found in the following cases decided by the Michigan Court of Appeals:

- ♦ An award of legal fees has been upheld where a party was forced to incur them as a result of the other party’s unreasonable conduct in the course of the litigation. *Stackhouse v Stackhouse*, *supra*. See also *Milligan v Milligan*, 197 Mich App 665, 671 (1992) (“An award of attorney fees in an action designed to prevent future litigation is not an abuse of discretion.”) and *Mauro v Mauro*, 196 Mich App 1, 3 (1992) (noncompliance with a court order justified award against offending party).
- ♦ The court should not require a party to invade his or her assets to satisfy attorney fees when he or she must rely on the same assets for support. *Maake v Maake*, 200 Mich App 184, 189 (1993); *Hanaway v Hanaway*, 208 Mich App 278, 299 (1995).
- ♦ An award of legal fees was not appropriate where the person requesting them had access to pro bono counsel. *Hawkins v Murphy*, 222 Mich App 664, 669-670 (1997).
- ♦ An award of legal and accountant’s fees was appropriate where the party requesting them had lesser income and earning ability than the other party. *Ianitelli v Ianitelli*, 199 Mich App 641, 645 (1993).
- ♦ An award of legal fees was not appropriate where the party from whom they were requested had assumed a greater amount of marital debt than the party making the request. *Heike v Heike*, 198 Mich App 289, 294 (1993).

- ♦ The court in a divorce proceeding has no authority to award a party the costs of defending a separate criminal action in which the complainant is the other party to the divorce. In *Westrate v Westrate*, 50 Mich App 673, 676 (1973), a wife was criminally charged with assault with intent to commit murder after shooting her husband in their home. When the parties divorced, the wife requested the trial court to award her the attorney fees incurred in defense of the criminal charges, asserting that the expenses incurred in the criminal proceeding were also necessary to defend her right to custody of the children and to part of the marital estate in the divorce action. The Court of Appeals upheld the trial court's determination that it had no jurisdiction to either consider or award the wife the requested attorney fees.

11.7 Effect of Divorce Judgment on Subsequent Tort Remedies for Domestic Violence

Alleged acts of domestic violence give rise to various tort claims by both parties in abusive relationships. Physically assaultive conduct directed against a victim's person or property can be the basis for claims against the abuser based on wrongful death, assault and battery, and trespass. Redress for emotional abuse may be available by way of civil actions for invasion of privacy, stalking, or intentional infliction of emotional distress. Alleged abusers may respond to the accusations against them by filing tort claims. In *Gramer v Gramer*, 207 Mich App 123 (1994), for example, a husband arrested for alleged spousal abuse responded by filing claims against his wife for false arrest, false imprisonment, malicious prosecution, and abuse of process. Although this benchbook cannot fully address the tort remedies applicable in the context of domestic violence, the discussion in this section will explore some of the issues that have arisen where the parties to a divorce action are also involved in separate tort litigation arising from alleged acts of domestic violence.*

*See Section 3.15 on tort remedies for stalking. On the interplay between divorce and torts arising from domestic violence, see Chiamp & Argiroff, *Tort Remedies for Domestic Abuse: An Underused Avenue of Relief*, 73 Mich Bar Journal 930 (1994).

A. Res Judicata and Collateral Estoppel

Defendants have asserted the doctrines of res judicata and collateral estoppel in response to their ex-spouses' tort claims filed subsequent to a judgment of divorce. These related doctrines are distinguished as follows:

- ♦ **Res judicata** bars further litigation of a controversy when: 1) the prior action was decided on the merits; 2) the matter in the second case was or could have been resolved in the first; and 3) both actions involved the same parties or their privies. *Sewell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575 (2001). Under this doctrine, the initial judgment extinguishes all claims that could have been raised in the suit as well as those claims that were actually litigated. *Bhama v Bhama*, 169 Mich App 73, 82 (1988); *Goldman v Wexler*, 122 Mich App 744, 747 (1983), citing Restatement, Judgments, §68, pp 293-294.
- ♦ **Collateral estoppel** bars re-litigation of factual issues that already have been decided. For this doctrine to apply, there must be a question of fact essential to the judgment that was actually litigated and determined by a valid and final judgment. The parties must have had a full opportunity to litigate the issue, and there must be mutuality of

estoppel. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 33 (2000). For a detailed discussion of the doctrines of collateral estoppel and mutuality of estoppel, and the interplay between them, see *Keywell v Bithell*, 254 Mich App 300 (2002). Collateral estoppel operates where the subsequent action is based upon a different cause of action from that upon which the prior action was based. The prior judgment is conclusive between the parties to it as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. *McCoy v Cooke*, 165 Mich App 662, 667 (1988).

Except in cases involving fraudulent inducement to marry, the Court of Appeals has held that res judicata and collateral estoppel do not preclude a party from seeking tort damages from an ex-spouse following entry of a divorce judgment. In fact, the doctrine of collateral estoppel may bind the defendant in a subsequent tort suit to a prior judicial determination that a battery occurred. The following cases illustrate the application of these doctrines:

♦ *Goldman v Wexler*, 122 Mich App 744 (1983):

After the dissolution of her marriage in October 1978, the plaintiff filed separate tort suit against her former husband for a battery committed in 1977. The trial court found that the prior divorce judgment barred plaintiff's tort claim and dismissed her action. Plaintiff appealed to the Court of Appeals. On appeal, the defendant asserted that res judicata precluded plaintiff's tort suit because the property settlement that was incorporated into the prior divorce judgment took into account the fault of the parties. Furthermore, the defendant maintained that the plaintiff had received at least partial compensation for the injuries suffered as a result of the alleged battery. The Court of Appeals disagreed with the defendant and reversed the trial court's decision. As to res judicata, the Court held:

"The present [tort] action is for a battery which is alleged to have occurred during the course of the marriage. Although we agree that fault continues to be a consideration in property division disputes in a divorce action . . . we cannot agree . . . that both claims constituted but a single cause of action. Consequently, this [tort] claim is neither barred by nor merged into the divorce judgment." 122 Mich App at 748.

As to collateral estoppel, the Court noted that the property division incorporated into the divorce judgment was the result of a negotiated settlement agreed to by the parties, and that consent judgments are not entitled to collateral estoppel effect. *Id.*

With respect to damages, the panel noted that the defendant could raise an affirmative defense to the extent that the consideration given plaintiff in the property settlement constituted payment for the injury suffered as a result of the battery. 122 Mich App at 749.

- ♦ *McCoy v Cooke*, 165 Mich App 662, 667 (1988):

Plaintiff's complaint against her former husband alleged that he beat her during their marriage and intentionally inflicted emotional distress on her. Based on the doctrine of collateral estoppel, the trial court granted the defendant summary disposition. The trial court found that the issue of defendant's abuse had been fully litigated during prior divorce proceedings, in the context of fault. The Court of Appeals reversed, finding that the trial court's application of collateral estoppel was in error. Citing *Goldman v Wexler*, *supra*, the panel held:

"Rather than precluding plaintiff's tort claim, collateral estoppel prevents relitigation of the issue whether a battery occurred. Since the trial judge in the divorce proceeding expressly resolved this issue by finding that defendant repeatedly battered plaintiff, collateral estoppel works against the defendant."

- ♦ *Bhama v Bhama*, 169 Mich App 73, 81-83 (1988):

The parties to this action were divorced in 1977. In 1985, a custody dispute arose between them that was ultimately resolved in November 1986. In September 1986, the plaintiff filed suit against her ex-husband for intentional infliction of emotional distress. This suit complained of intentional outrageous conduct that alienated plaintiff from her children. The trial court entered summary judgment for the defendant, finding that the plaintiff had failed to state a claim on which relief could be granted, and that her claim was precluded by res judicata. On appeal, the Court of Appeals reversed the trial court's decision. It held that the plaintiff had stated an actionable claim to which res judicata was no obstacle.* The panel noted three prerequisites to the proper invocation of res judicata: 1) the former action was decided on the merits; 2) the matter contested in the second action was decided in the first; and 3) the two actions were between the same parties or privies. If these prerequisites are met, "all claims that could have been raised in the first action are barred as well as those claims that were actually litigated." 169 Mich App at 81-82. With respect to the second of the three prerequisites, the panel stated:

"[I]f it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other." *Id.*, citing 30A Am Jur, Judgments, §365, p 407-408.

*See Section 3.15(B) on intentional infliction of emotional distress.

Applying the foregoing criteria, the Court of Appeals found that the custody and tort proceedings constituted different causes of action, so that *res judicata* could not be appropriately applied to preclude the plaintiff's tort claims. The Court determined that plaintiff's tort claim could not be sustained by the same facts or proofs that were required for the 1985 custody proceeding. The custody proceeding was litigated under the Child Custody Act, which set forth an 11-factor test for determining the best interests of the children. MCL 722.23. Although the issue of defendant's "brainwashing" the children arose with respect to one of these factors, the court's "best interest" determination in the custody proceeding did not require it to hear proof of the elements of intentional infliction of emotional distress, namely, outrageousness, intent, causation, and emotional distress to the plaintiff. Moreover, plaintiff's tort suit sought monetary damages, which were not at issue in the prior custody proceeding.

♦ *Gubin v Lodisev*, 197 Mich App 84 (1992):

Defendant appealed from two judgments: 1) an October 1988 divorce judgment; and 2) a separate July 1988 judgment awarding plaintiff damages for fraud. The fraud claim alleged that defendant induced plaintiff to marry him by promising to be a faithful husband if she would take the actions necessary to allow him to immigrate to the U.S. The Court of Appeals reversed the fraud judgment, holding that plaintiff's action for fraud was so intimately bound with the existence and breakdown of the marriage relationship that a separate tort action was inappropriate. 197 Mich App 88-89. The panel distinguished *McCoy v Cooke* and *Goldman v Wexler*, *supra*, noting that these cases "involved torts that are not bound so intimately with the breakdown of the marriage itself." *Id.* at 88.

Note: The *Gubin* panel's distinction of *McCoy* and *Goldman* may be based on an erroneous reading of the facts in those cases. The *Gubin* panel characterized the claims in these cases as "tort action[s] for an alleged battery and intentional infliction of emotional distress *committed after the divorce judgment had been entered.*" 197 Mich App at 88. [Emphasis added.] In *McCoy*, however, the plaintiff's complaint alleged that her former husband had beaten her "during their marriage." 165 Mich App at 664. In *Goldman*, the alleged battery occurred during the parties' marriage, a year before the judgment of divorce was entered. 122 Mich App at 746.

With regard to fraud, see also *Courtney v Feldstein*, 147 Mich App 70 (1985). The plaintiff in this case sued her ex-husband following entry of a divorce judgment, alleging that he had fraudulently concealed the value of his assets during the divorce proceedings. The Court of Appeals held that *res judicata* was no bar to the plaintiff's claim, noting that "[a]s a general proposition, the principles of *res judicata* may not be invoked to sustain fraud." 147 Mich App at 74.

B. Effect of Release Agreement in Property Settlement

Although the doctrines of res judicata and collateral estoppel may not preclude tort claims brought subsequent to entry of a divorce judgment, the parties themselves may agree to relinquish such claims in a property settlement incorporated into the judgment. In *Gramer v Gramer*, 207 Mich App 123 (1994), the plaintiff filed claims against his ex-wife alleging false arrest, false imprisonment, malicious prosecution, and abuse of process, following his arrest on criminal charges lodged during the pendency of the parties' divorce action. The trial court dismissed these claims based upon a release in the parties' property settlement agreement, which was incorporated into the divorce judgment. The release provided:

“WHEREAS, the parties are desirous of definitely and for all times settling and determining all matters of property, and all other claims or rights between them which may have arisen or might arise out of the marriage relationship between them and as a result of the action for divorce. . . .” 207 Mich App at 124.

On appeal, the plaintiff argued that the parties did not intend to include his tort claims in their property settlement agreement because these claims did not constitute marital property. The Court of Appeals disagreed and affirmed the trial court's dismissal of the plaintiff's claims. In reaching its conclusion, the panel reasoned that absent factors such as fraud or duress, trial courts should enforce a release contained in a property settlement agreement. As with other agreements in the nature of a contract, the scope of a release should be determined by the intent of the parties as expressed in its language. In this case, the panel determined that there was no claim of fraud or duress, and that the release language clearly expressed an intent to settle all claims arising out of the parties' marriage and divorce. It further found that plaintiff's tort claims arose out of the parties' marriage relationship, and were therefore subject to the parties' agreement,* regardless of whether or not they could be characterized as marital property: “A property agreement that purports to settle all claims arising from the marriage and divorce bars future or existing tort claims brought by one spouse against another.” 207 Mich App at 126.

*Although it was not essential to the holding, the panel also found that the plaintiff's tort claims were property subject to property division, and were properly included in the property settlement agreement.

